Remarks/Arguments

This paper addresses the issues raised in the Office Action made Final mailed 5 September 2006, and supplements previous responses thereto. This amendment is submitted in compliance with the guidelines of the revised amendment practice. See 1267 Off. Gazette 106.

Claims 32-37, 40-50 are currently pending. Claims 32, 34, 43, 44, 46 and 48-50 were rejected under 35 U.S.C. § 102(b) as being anticipated by Perali et al (USPN 4,914,762). Claim 50 was rejected under 35 U.S.C. § 103(a) as being unpatentable over Perali. Claims 48 and 49 were rejected under 35 U.S.C. § 103(a) as being unpatentable over Perali et al in view of Marrone (USPN 5,007,449). Claims 33 and 35 were rejected under 35 U.S.C. § 103(a) as being unpatentable over the prior art as applied to Claims 32 and 34, and further in view of Gewecke (sic) (USPN 3,368,560). Claims 36-41 were rejected under 35 U.S.C. § 103(a) as being unpatentable over the prior art as applied to Claims 32 and 34, and further in view of Canonica (USPN 3,239,956). Claims 42, 45 and 47 were rejected under 35 U.S.C. § 103(a) as being unpatentable over Perali. New Claim 51 has been submitted but not yet entered. No new matter has been added. As set out below, Applicant respectfully submits that the present invention as claimed is patentable over the cited art and urges the Examiner to reconsider the pending rejections.

Secondary Considerations of Nonobviousness

This supplemental response addresses the secondary considerations, such as commercial success, that support the conclusion that the subject matter contained within the claims of the present invention are nonobviousness over the cited prior art. In support of this contention, Applicant submits the affidavits of Mr. Jeffery K. Slaboden, Applicant's Vice President, and Mr.

Bill Vernor, Applicant's Vice President of Administration.

A brief overview of the subject matter making up the present invention is in order. The present invention, as claimed, discloses a flexible container having two flexible members forming a chamber therebetween for containing liquid cleanser. These flexible members have a modulus of elasticity conducive to liquid containment. Liquid cleanser is contained within the chamber. A flexible closure is coupled to one of the flexible members for repetitive filling and expelling the liquid cleanser from the chamber in response to squeezing force selectively applied to at least one of the two flexible members. Finally, a stopper seals the flexible closure. See, Affidavit of Jeffery K. Slaboden, para. 3.

The present invention has been referred to as a "GEL PAK" and has been commercially available under the brand names of "Bathing Beauties", "Good Clean Fun" and Bubblicious" since 2002. See, Affidavit of B. Vernor, para. 3, 5. The Applicant has sold this product to many national companies, including Wal-Mart, Target, Bed Bath & Beyond, K-Mart, The Gap, Costco, Cracker Barrel, Eckerd Drugs, Albertsons, and many independent gift retailers. See, Affidavit of J. Slaboden, para. 5.

Further, a brief overview of the soap, bath and shower industry, the market that the GEL PAK product is sold, is in order. This retail industry is very large and competitive, having annual sales of approximately $1.7 billion dollars. Due to the heavy competition from general retail companies such as Wal-Mart and Target, and from specialty companies such as Bed, Bath & Beyond, the unit price for a particular item is at a nearly uniform amount across the market, with only minimal increases in price. This competition creates a situation where gains in market share are obtained based on the introduction of new products. This competition further creates a

situation that a product must perform well from its initial introduction into the market or will be removed never to sold again. See, Affidavit of B. Vernor, para. 4.

As will be set out in greater detail below, the inclusion of a liquid cleanser within a flexible container has not been disclosed prior to the present invention as evidenced by the success the sale of the inventive device has obtained.

Commercial Success

An applicant who is asserting commercial success to support its contention of nonobviousness bears the burden of proof of establishing a nexus between the claimed invention and evidence of commercial success. The term "nexus" designates a factually and legally sufficient connection between the evidence of commercial success and the claimed invention so that the evidence is of probative value in the determination of nonobviousness. Demaco Corp. v. F. Von Langsdorff Licensing Ltd., 851 F.2d 1387, 7 USPQ2d 1222 (Fed. Cir. 1988) (Emphasis in original). Accordingly, for a device to be commercially successful, the success of the device in question must (1) derive from the features as set forth in the claims and not from other features found on or in connection with the device and (2) the commercial success be sufficiently based on the device and not from other sources.

To be pertinent to the issue of nonobviousness, the commercial success of a device falling within the claims of the patent must flow from the functions and advantages disclosed or inherent in the description in the specification. Furthermore, the success of an embodiment within the claims may not be attributable to improvements or modifications made by others. In re Vamco Machine & Tool, Inc., 752 F.2d 1564, 224 USPQ 617 (Fed. Cir. 1985).

In the present case, the thing sold is the device itself, namely the flexible container set forth

in the instant claims. This device does not include any additional features, nor is it part of a large device or product. It is a stand-alone product. See, Affidavit of J. Slaboden, Para. 3 Furthermore, this device was not a modification of an earlier or existing device. See, Affidavit of J. Slaboden, para. 4. Accordingly, this device as sold by the Applicant flows in its entirety from the elements of the claimed invention, as set out in the broadest independent claim, Claim 32. See, In re Tiffin, 448 F.2d 791, 171 USPQ 294 (CCPA 1971) No other elements or features are attributable to the sales thereof. Thus, the commercial success this device enjoys is due solely to the claimed features itself, and not toward any unclaimed features, improvement, modification or addition. See, Joy Technologies Inc. v. Manbeck, 751 F. Supp. 225, 229, 17 USPQ2d 1257, 1260 (D.D.C. 1990), aff'd, 959 F.2d 226, 228, 22 USPQ2d 1153, 1156 (Fed. Cir. 1992).

As for the sales of the GEL PAK product, the sales amounts are impressive given that each unit sells for approximately $1-2 dollars wholesale. Since its introduction in 2002, total units sold has exceeded 3 million with estimated retail sales exceeding $7.2 million. The year by year break down includes over 500,000 units (nearly $1 million wholesale) sold in 2002, nearly 1,000,000 units (nearly $1.5 million wholesale) sold in 2003, and over 600,000 units (over $1 million wholesale) sold in 2004. See Affidavit of B. Vernor, para. 9. The sales have leveled off at around 500,000 units per year since 2004. To have sold over 2 million units (over $3 million wholesale) during the first three years of introduction is considered to be successful in this very competitive market. See Affidavit of B. Vernor, para. 9

While it is acknowledged that sales figures alone do not show commercial success absent evidence as to market share, or as to what sales would normally be expected in the market, see, Cable Electric Products, Inc. v. Genmark, Inc., 770 F.2d 1015, 226 USPQ 881 (Fed. Cir. 1985);

see also, Ex parte Standish, 10 USPQ2d 1454 (Bd. Pat. App. & Inter. 1988), Applicant submits that such sales demonstrate a gain in market share as such sales are not normally seen in the extremely competitive soap, bath and shower industry. See, Affidavit of B. Vernor, para. 9.

Additionally, the commercial success of this device is due to the claimed features, and not due to the result of promotion, advertising or other business events. As set out by Mr. Slaboden, the introduction of this product to the market place was done in the same manner as all other products, which includes placing it within the company sales catalog and offered for sale through trade shows, individual sales calls and through a distributor network. As is typical with all new products introduced by Applicant, individual product sell sheets are created and used by the sales representatives. See, Affidavit of J. Slaboden, para. 9-10. Accordingly, there was no shift in advertizing or an increase in advertising for the GEL PAK products.

By not increasing or shifting advertisements, nor modifying its marketing approach for the GEL PAK products, it is conclusive that the success this product enjoys can be directly tied to the invention as claimed, especially since the marketplace, where consumers are free to choose products, is extremely competitive. This factor weighs in favor of nonobviousness. See, In re Mageli, 470 F.2d 1380, 176 USPQ 305 (CCPA 1973); See also, In re Noznick, 478 F.2d 1260, 178 USPQ 43 (CCPA 1973); See also, Ex parte Anderson, 21 USPQ.2d 1241 (BPAI 1991).

Further, the GEL PAK product did not replace, was a modification of, an existing product. Thus, the success of this product could not be attributable to the advertisements, brand awareness, or market position of any other related product. See Pentec, Inc. v. Graphic Controls Corp., 776 F.2d 309, 227 USPQ 766 (Fed. Cir. 1985) (commercial success may be shown when success cannot be attributable to extensive advertising and position as a market leader before the

introduction of the patented product).

Additionally, the soap, bath and shower industry has not experienced any sort of technological breakthrough that would lead consumers to increase their purchasing of the GEL PAK product. Nor has there been any sort of change of consumer demand for such products that would explain the significant sales of the GEL PAK products. See, Affidavit of B. Vernor, para. 10. See, In re Fielder, 471 F.2d 690, 176 USPQ 300 (CCPA 1973) (commercial success may be shown when success is not due to recent changes in related technology or consumer demand).

Based on the above, the claimed subject matter has experienced significant commercial success. Accordingly, this factor weighs in favor of nonobviousness.

Industry Recognition

An additional factor that is probative of nonobviousness is that of industry recognition. See, In re Metz, Civ App. 97-1263 (Fed. Cir. Sept. 22, 1998) (unpublished). This factor is based on the concept that when the industry recognizes the contribution of the item at issue, that item could not have been obvious.

In this case, the GEL PAK product, when sold under the *Good, Clean, Fun*® trademark was awarded the *Teen People* magazine's Trendspotter Hot Pick Award Winner for Hottest Packaging during the 2004 National Association of Chain Drug Stores tradeshow. See, Affidavit of J. Slaboden, para. 14. The packaging referred to in this award was the two-piece flexible container have cleanser therein, as set out in the pending claims. Thus, this award was based solely on the subject matter claimed, and not any other factor, such as marketing, advertising or any additional elements beyond the claimed subject matter. Thus, this factor weighs in favor of nonobviousness.

Copying

An additional factor that is probative of nonobviousness is that of copying. This factor is based on the concept that when a device is copied by a competitor, it is desirable but was not obvious. In this case, after the introduction of the GEL PAK product to the market, multiple competitors have started selling their own versions of this product. See, Affidavit of J. Slaboden, para. 12. This copying demonstrates the desirability of the claimed invention. If this invention was not acceptable to consumers, these companies would not have sent time and money making and selling their versions of this product.

Further, this copying demonstrates that the introduction of this product, as set out in the claims, has created a new product category within this industry. Prior to the introduction of Applicant's product, no other competitor sold this type of product. However, since its introduction by Applicant, many competitors now advertise their own "gel pak" product. See, Affidavit of J. Slaboden, para. 11.

This increased competition has also had the negative effect of having some customers who first purchased GEL PAK products from the Applicant to start purchasing copied products from competitors. See, Affidavit of J. Slaboden, para. 13. This is the basis for the leveling off of the sales figures set out above. Thus, while the "gel pak" product market segment has been growing, the number of competitors has also started growing, causing an erosion of Applicant's market share.

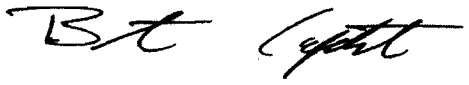
In sum, however, the copying of the GEL PAK product by competitors is clear evidence of the desirability of the claimed invention. Had this invention been obvious, some other competitor would have brought it forward long prior to that of the Applicant. It is submitted,

however, that the claimed invention in not obvious, and the market's reaction thereto, supports this conclusion. Accordingly, this factor weighs in favor of nonobviousness.

Conclusion

In conclusion, based on the above, and the remarks submitted previously, it is submitted that the secondary considerations as set out above support the contention that the instant invention, as claimed, is not obvious over the cited prior art. For the reasons set forth above, it is respectfully submitted the above claims, as amended, are not rendered unpatentable over the cited prior art and are in a condition for allowance. Reconsideration of the rejections is respectfully requested.

Respectfully submitted,



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March 2, 2007
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